IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 12TH SEPTEMBER 2007 / 21ST BHADRA 1929

CRL.A.No. 1343 of 2006(C)

SC.528/2004 of ADDL. DISTRICT AND SESSIONS JUDGE (FAST TRACK COURT-I) THIRUVANANTHAPURAM

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APPELLANT: ACCUSED:

SASI, S/O.NARAYANAN,
VILAYILVEEDU, KATTAYIKONAM,
AYIROOPPARA VILLAGE,
THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.P.K.MUHAMMED

RESPONDENT: COMPLAINANT:

STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM

BY P.P.SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/09/2007, THE COURT ON 12/09/2007 DELIVERED THE FOLLOWING:

Crl.M.A.No. 6793/2006 in Crl.A.No. 1343/2006

Dismissed.

12-9- 2007 Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

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Crl.L.P.No. /2006

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Judgment

-12-2006

K.Thankappan, J.

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Crl. A. No. 1343 of 2006

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Dated this the 12th September, 2007

JUDMENT

Accused in S.C.No.528/2004 on the file of the Court of the Additonal District and Sessions Judge (Fast Track Court-I), Thiruvananthapuram is the appellant. He was found guilty under sections 55(a) and 8(1) read with section 8(2) of the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for 1 ½ hears and to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for six months. The above conviction and sentence awarded against the appellant are assailed in this appeal.

2. The trial court has mainly relied on the evidence of PWs.2 to 4 who are the official witnesses. Though the prosecution examined PW1 as an independent witness, he had not supported the prosecution and he was declared hostile to the prosecution. PW2 who detected the offence stated that while they were on patrol duty and when they reached at Narikkal-Kalavarathala road, they saw the appellant coming in opposite direction with a black can having a capacity of 2 ½ litres. The appellant, on seeing the

excise party, attempted to retreat, but he was detained and examined the can in the presence of independent witnesses. On examination, it was found that it was arrack. The appellant was arrested and on preparing Ext.P1 mahazar seized the can and sealed the sane and affixed a label. He further stated that the appellant and MO1 can were produced before the Excise Office and registered the case against the appellant. The evidence of this witness is corroborated with the evidence of PW3 who accompanied PW2 at the time of detection of the crime. PW4 was the Excise Inspector who filed the final charge. Ext.P7 chemical analysis report would show that the sample contained 30.01% ethyl alcohol by volume.

3. The judgment of the trial court is attacked by the learned counsel for the appellant mainly on three grounds. Firstly, it is contended that the trial court had committed an error in finding the appellant guilty of the charge on accepting the evidence of Pws.2 to 4 who are official witnesses and the only independent witness was declared hostile to the prosecution. Secondly, it is submitted that the finding of the trial court that the appellant had committed an offence under section 55(a) of the Abkari Act is against the dictum laid down by this Court in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631). Thirdly, it is submitted that PW2 had not complied with the provisions

of the the Abkari Act as well as the provisions contained in the Kerala Excise Manual while detecting the offence.

4. The prosecution case against the appellant is that he was found in possession of 2 ½ litres of arrack. On the side of the prosecution PWs.1 to 4 were examined and Exts.P1 to P7 and MO1 were marked. When the appellant was questioned under section 313 Cr.P.C., he stated that he was innocent and he was falsely implicated by the Excise officials. Though PW1 was examined as an independent witness, he was declared hostile to the prosecution. PWs.3 and 4 had given evidence in support of the prosecution case. They are the official witnesses. There is no legal bar for relying on the testimonies of the official witness to prove the prosecution case provided that their evidence is free from doubt or any other infirmity. As per section 53 of the Abkari Act, the police officer in charge of the police station shall take charge of and keep in safe custody pending the orders of a Magistrate or an Abkari Inspector articles seized under the the Abkari Act and shall allow any abkari officer who accompanied such articles to affix his seal to such articles and shall take samples from them and all samples so taken shall be sealed with the seal of the officer in charge of the police station. In this Context, PW2 admitted that when he had seized MO1, he had not taken any sample from MO1 in the presence of any

witness or in the presence of the appellant. There is no evidence to show that MO1 contains any seal or signature of the appellant or signature of any independent witness. It is relevant to note that when MO1 can was produced before the court, the can was empty. With regard to the taking of sample and sending the same for chemical analysis, the prosecution had not adduced any evidence. On a perusal of Ext.P6 would show that the Excise Inspector requested the court to take sample from the contraband and send for chemical analysis. This letter is dated 4-10-2001. It is to be noted that there was an endorsement of the court that the sample was taken on 4-12-2001. No Thondy Clerk has been examined to prove that the sample was taken from the very same contraband article alleged to have been seized from the appellant. It is the duty of the excise Officer or Police Officer to take sample as per the provisions of section 53 the Abkari Act and para 34 of the Kerala Excise Manual. In the above circumstances, the contention that the officers have not complied with the provisions of the Abkari Act and the Kerala Excise Manual is sustainable. It is seen from Ext.P5 forwarding note submitted by the Excise Inspector that no space was there to keep the thondi article and hence it was directed to be kept in the Excise office, Kazhakuttom. If that be so, it is the duty of the prosecution to prove that the contraband article was produced before the court after taking

sample and the same was kept intact. This Court has already found that there is no evidence to show the sample which got analyzed was taken from MO1. As per a decision reported in Rajendran V. State of Kerala (ILR 2007(1) Ker. 708), it is the duty of the excise Officer or Police Officer to take sample as per the provisions of section 53 the Abkari Act and para 34 of the Kerala Excise Manual.

6. As per para 34 of the Kerala Excise Manual, seizure should be reported to the court forthwith and request made for sending a sample for analysis, which reads as follows:-

> "34. Contraband articles seized such as wash which may be, or are likely to become, so offensive as to be a nuisance need not be sent to the Range Office for safe custody. But if in any case an officer judges their retention to be necessary for production in court or for any other reasons, he must bury them or make such other arrangements for their safe custody as will not cause a nuisance. Generally speaking, such articles may safely be destroyed at once in the presence of the accused and the Inspector after taking samples of them. The accused may also be required to affix his seal to the samples. Three samples of not less than (1) 130 grams weights from each distinct kind of excisable drug and (2) two samples of such smaller quantity as may be available of each kind of liquor or wash, may be taken in the presence of the Excise Inspector or senior most Excise Officer present and the accused. Each set of these samples should then be sealed and marked with the same number or mark the particulars of which should be entered in the appropriate columns of the contraband register and in the occurrence report of the case. One sample of each set may be taken by the officer depositing it and two may be left with the officer in charge of the Range

> with the occurrence report of the case. If the articles are deposited by the Inspector or a member of the Range staff, all the 3 may be retained in the Range Office. One of these samples will then be available for the use of the officer in charge of the Range for analysis, if need be and the other for the Magistrate's inspection, if the case is prosecuted before a Magistrate."

Section 53 of the Abkari Act stipulates that all officers in charge of police station shall take charge of and keep in safe custody all articles seized under the the Abkari Act and allow any abkari officer to affix his seal to the articles and to take samples of and from them and all samples taken shall also be sealed with the seal of the officer in charge of the police station. Apart from the above, as per the provisions of the Kerala Chemico-Legal Examination Rules 1959, sample should have been sent for opinion of the Chemical Examiner and the Chemical Examiner shall, as far as practicable, furnish a quantitative analysis stating the result of the analysis which led to the conclusion in his report under section 293 of Cr.P.C. Evidence adduced by the prosecution would show that no sample was taken from the contraband article by PW2. In the above circumstances, the evidence of PWs.2 to 4 cannot be relied on to prove the prosecution case. Hence, the finding of the trial court that MO1 can was seized from the appellant as alleged by the prosecution is not proved beyond reasonable doubt.

7. Yet another point to be considered in the light of the contentions raised by the learned counsel for the appellant is that the finding of the court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is legally sustainable or not? In Surendran 's case (Supra) a Division of this Court held that when a person is in "possession of illicit liquor" while illegally importing it, the case would be covered under section 55(a) of the Abkari Act and in a case where the possession is of illicit liquor the case would fall within section 58 of the Abkari Act. In Sudhepan's case (Supra) this Court held that under section 55(a) the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. The prosecution has not adduced any evidence to show that the possession of the arrack is in connection with any import, export or transport of the same. If that be so, the finding of the trial court that the appellant had committed an offence under section 55(a) of the Abkari Act is not sustainable and is liable to be set aside. Taking into consideration all the facts and circumstances of the case, this Court is of the view that the prosecution has failed to prove the case against the appellant beyond reasonable doubt.

9. Hence, the judgment under appeal is set aside and the appellant is acquitted. Bail bod executed by the appellant shall stand cancelled. It is made clear that if any amount is deposited by the appellant as fine that shall be refunded to him as per law.

The appeal is allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

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Crl.A. No.1188/2002

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Judgment

21-8-2007